

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

OWEN LINO,
CDCR #J-45685,

Plaintiff,

vs.

J. KELLERMAN, et al.;

Defendants.

Civil No. 10cv0449 BTM (JMA)

ORDER:

(1) GRANTING MOTION TO PROCEED *IN FORMA PAUPERIS*, IMPOSING NO INITIAL PARTIAL FILING FEE, GARNISHING \$350.00 BALANCE FROM PRISONER'S TRUST ACCOUNT [Doc. No. 2]; AND

(2) DISMISSING COMPLAINT FOR FAILURE TO STATE A CLAIM PURSUANT TO 28 U.S.C. §§ 1915(e)(2) AND 1915A(b)

Owen Lino ("Plaintiff"), a state prisoner currently incarcerated at Calipatria State Prison, and proceeding pro se, has submitted a civil action pursuant to 42 U.S.C. § 1983. Additionally, Plaintiff has filed a Motion to Proceed *In Forma Pauperis* ("IFP") [Doc. No. 2].

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I.

MOTION TO PROCEED IFP [Doc. No. 2]

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the six-month period immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2). The Court finds that Plaintiff has no available funds from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4). Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP [Doc. No. 2] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350 balance of the filing fees mandated shall be collected and forwarded to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

II.

INITIAL SCREENING PER 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1)

22 Notwithstanding IFP status or the payment of any partial filing fees, the Court must
23 subject each civil action commenced pursuant to 28 U.S.C. § 1915(a) to mandatory screening
24 and order the sua sponte dismissal of any case it finds “frivolous, malicious, failing to state a
25 claim upon which relief may be granted, or seeking monetary relief from a defendant immune
26 from such relief.” 28 U.S.C. § 1915(e)(2)(B).

Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person acting under color of state law committed the conduct at issue, and (2) that the conduct deprived

1 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the
 2 United States. *See* 42 U.S.C. § 1983.

3 Plaintiff alleges that his Fourteenth Amendment due process rights were violated during
 4 his disciplinary hearing that led to his placement in Administrative Segregation (“Ad-Seg”).
 5 “The requirements of procedural due process apply only to the deprivation of interests
 6 encompassed by the Fourteenth Amendment’s protection of liberty and property.” *Board of*
 7 *Regents v. Roth*, 408 U.S. 564, 569 (1972). State statutes and prison regulations may grant
 8 prisoners liberty interests sufficient to invoke due process protections. *Meachum v. Fano*, 427
 9 U.S. 215, 223-27 (1976). However, the Supreme Court has significantly limited the instances
 10 in which due process can be invoked. Pursuant to *Sandin v. Conner*, 515 U.S. 472, 483 (1995),
 11 a prisoner can show a liberty interest under the Due Process Clause of the Fourteenth
 12 Amendment only if he alleges a change in confinement that imposes an “atypical and significant
 13 hardship . . . in relation to the ordinary incidents of prison life.” *Id.* at 484 (citations omitted);
 14 *Neal v. Shimoda*, 131 F.3d 818, 827-28 (9th Cir. 1997).

15 Therefore, to establish a due process violation, Plaintiff must first show the deprivation
 16 imposed an atypical and significant hardship on him in relation to the ordinary incidents of
 17 prison life. *Sandin*, 515 U.S. at 483-84. For example, in *Sandin*, the Supreme Court considered
 18 three factors in determining whether the plaintiff possessed a liberty interest in avoiding
 19 disciplinary segregation: (1) the disciplinary versus discretionary nature of the segregation; (2)
 20 the restricted conditions of the prisoner’s confinement and whether they amounted to a “major
 21 disruption in his environment” when compared to those shared by prisoners in the general
 22 population; and (3) the possibility of whether the prisoner’s sentence was lengthened by his
 23 restricted custody. *Id.* at 486-87.

24 Plaintiff has failed to allege any facts from which the Court could find there were atypical
 25 and significant hardships imposed upon him as a result of the Defendants’ actions. Therefore,
 26 the Court finds that Plaintiff has failed to allege a liberty interest in remaining free of Ad-Seg,
 27 and thus, has failed to state a Fourteenth Amendment due process claim. *Id.* at 486.

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1 The finds that Plaintiff's Complaint fails to state a section 1983 claim upon which relief
2 may be granted, and is therefore subject to dismissal pursuant to 28 U.S.C. §§ 1915(e)(2)(b) &
3 1915A(b). The Court will provide Plaintiff with an opportunity to amend his pleading to cure
4 the defects set forth above.

III.

CONCLUSION AND ORDER

7 Good cause appearing, IT IS HEREBY ORDERED that:

8 1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2] is
9 **GRANTED.**

10 2. The Secretary of California Department of Corrections and Rehabilitation, or his
11 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee
12 owed in this case by collecting monthly payments from the account in an amount equal to twenty
13 percent (20%) of the preceding month's income and forward payments to the Clerk of the Court
14 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).
15 ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER
16 ASSIGNED TO THIS ACTION.

17 3. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
18 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
19 Sacramento, California 95814.

IT IS FURTHER ORDERED that:

21 4. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C.
22 §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave
23 from the date this Order is "Filed" in which to file a First Amended Complaint which cures all
24 the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in
25 itself without reference to the superseded pleading. *See* S.D. Cal. Civ. L. R. 15.1. Defendants
26 not named and all claims not re-alleged in the Amended Complaint will be deemed to have been
27 waived. *See King v. Ativeh*, 814 F.2d 565, 567 (9th Cir. 1987).

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5. The Clerk of Court is directed to mail a form § 1983 complaint to Plaintiff.

IT IS SO ORDERED.

DATED: April 21, 2010

Benny Ted Markowitz

Honorable Barry Ted Moskowitz
United States District Judge